

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

ROBERT BAUMHOVER,

Movant,

vs.

UNITED STATES OF AMERICA.

No. C16-1004-LRR
No. CR14-1004-LRR

ORDER

This matter appears before the court on Robert Baumhover's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1).¹ Robert Baumhover ("the movant") filed such motion on February 8, 2016. For the following reasons, the movant's 28 U.S.C. § 2255 motion shall be denied and a certificate of appealability shall be denied.²

¹ If a prisoner is in custody pursuant to a sentence imposed by a federal court and such prisoner claims "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, [the prisoner] may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255; *see also Daniels v. United States*, 532 U.S. 374, 377 (2001).

² No response from the government is required because the 28 U.S.C. § 2255 motion and file make clear that the movant is not entitled to relief. *See* 28 U.S.C. § 2255; Rule 4(b), Rules Governing Section 2255 Proceedings. Similarly, an evidentiary hearing is not necessary. *See* Rule 8, Rules Governing Section 2255 Proceedings; *see also Engelen v. United States*, 68 F.3d 238, 240-41 (8th Cir. 1995) (stating that district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing "if (1) the . . . allegations, accepted as true, would not entitle the [movant] to

(continued...)

The AEDPA contains a one year period of limitation during which a 28 U.S.C. § 2255 motion must be filed.³ The statute of limitation begins to run from the latest of four circumstances. The first of these circumstances is the date on which the judgment of conviction became final. Here, the movant's conviction became "final" on November 2, 2014, that is, the last date he could have filed a timely petition for a writ of certiorari. *See Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when [the United States Supreme Court] affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Sup. Ct. R. 13 (setting forth time for petitioning for a writ of certiorari). Given such date,

(...continued)

relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact"); *United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986) (stating that district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255).

³ A 1-year period of limitation shall apply to a motion under this section.

The limitation period shall run from the latest of–

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

the movant needed to file the instant motion by no later than November 2, 2015. The movant did not file his motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 until February 8, 2016, which is months past the last date it properly could have been filed.

Further, the movant is unable to rely on any of the remaining three timeliness provisions set forth in 28 U.S.C. § 2255. Although the movant cites to the Supreme Court's decision in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), that case does not give rise to relief when the facts of this case are considered. Indeed, the movant committed an offense under 18 U.S.C. § 2252A, and such statute is not unconstitutionally vague. *See, e.g., United States v. O'Malley*, 854 F.2d 1085, 1087 (8th Cir. 1988) (rejecting unconstitutionally vague argument); *see also United States v. Thompson*, 653 F.3d 688, 696 (8th Cir. 2011) (observing that statute of conviction provided notice of what materials would be "sexually explicit"). Further, there is no basis to extend the ruling of *Johnson* to USSG §2G1.1 or USSG §2G2.2. *See Donnell v. United States*, 826 F.3d 1014, 1017 (8th Cir. 2016) (refusing to create "a second rule that would apply *Johnson* and the constitutional vagueness doctrine to a provision of the advisory sentencing guidelines"); *Richardson v. United States*, 623 F. App'x 841, 842-43 (8th Cir. 2015) (denying authorization to file a successive motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 with respect to movant's challenge to his sentencing guidelines calculations because any extension of the rule in *Johnson* is not a new substantive rule under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)); *see also United States v. Maurer*, 639 F.3d 72, 78 n.4 (3d Cir. 2011) (holding that USSG §2G2.2(b)(4) was not unconstitutionally vague because it gave "a person of ordinary intelligence fair notice of the conduct to which it applies" and did not "authorize or encourage arbitrary and discriminatory enforcement").

The Eighth Circuit Court of Appeals has held that the doctrine of equitable tolling applies to 28 U.S.C. § 2255 motions. *See United States v. Martin*, 408 F.3d 1089, 1092-

93 (8th Cir. 2005). However, equitable tolling only applies “where ‘extraordinary circumstances’ beyond a prisoner’s control prevent timely filing.” *Id.* at 1093 (citing *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001), *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), and *Paige v. United States*, 171 F.3d 559, 561 (8th Cir. 1999)). “Ineffective assistance of counsel, where it is due to an attorney’s negligence or mistake, has not generally been considered an extraordinary circumstance in this regard.” *Id.* (citing *Beery v. Ault*, 312 F.3d 948, 951 (8th Cir. 2002), and *Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir. 2003)); *see also Kreutzer*, 231 F.3d at 463 (holding “counsel’s confusion about the applicable statute of limitations does not warrant equitable tolling”). The movant does not offer a valid excuse for failing to timely file his 28 U.S.C. § 2255 motion. Therefore, the court finds that the movant’s situation does not fall within the limitation period allowed by 28 U.S.C. § 2255.

In sum, the claims that the movant asserts could have been asserted before a judgment of conviction was entered, on direct appeal or in a timely 28 U.S.C. § 2255 motion. “‘The one year period provided him with reasonable opportunity to file for relief; and if that time period has expired, it is the result of his own doing and not due to any inadequacy in the statute.’” *United States v. Lurie*, 207 F.3d 1075, 1078 (8th Cir. 2000) (quoting *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999)). Accordingly, the movant’s motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 shall be denied.

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order is subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253(a). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability

may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedeman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *See Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. “[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, “the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *See Slack*, 529 U.S. at 484.

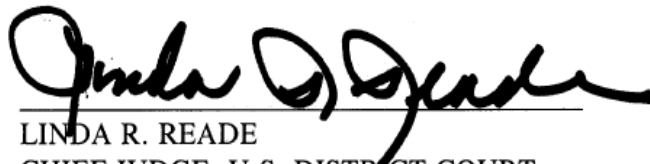
Having thoroughly reviewed the record in this case, the court finds that the movant failed to make the requisite “substantial showing” with respect to the claims that he raised in his motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because he does not present a question of substance for appellate review, there is no reason to grant a certificate of appealability. Accordingly, a certificate of appealability shall be denied. If he desires further review of his 28 U.S.C. § 2255 motion, the movant may request issuance of the certificate of

appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520-22.

IT IS THEREFORE ORDERED:

- (1) The movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1) is **DENIED**.
- (2) A certificate of appealability is **DENIED**.
- (3) The motion to proceed in forma pauperis (civil docket no. 2) and motion for transcripts (civil docket no. 3) are **DENIED** as moot.

DATED this 10th day of November, 2016.

A handwritten signature in black ink, appearing to read "Linda R. Reade", written over a horizontal line.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA